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**Campbell Electric Co., Inc. and Local Union 153, International Brotherhood of Electrical Workers, AFL-CIO. Case 25-CA-27041-1**

September 30, 2003

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On April 5, 2001, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings<sup>1</sup>, and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

1. During the morning of January 26, 2000<sup>3</sup> Respondent's Superintendent Gene Boodt came to employee Matthew Petruska's jobsite. Boodt asked Petruska to whom he had been talking about his wages, inquired how everyone had found out how much Petruska made, asserted that Petruska should not have received his last wage increase, and stated that if he were Petruska he would look for another job. The judge found that Boodt had unlawfully interrogated Petruska by asking him about his discussion of wages with others, and had unlawfully threatened Petruska by telling him that he should not have received his last wage increase, and should look for another job.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent implies that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>2</sup> As explained, we shall modify the judge's recommended remedy, Order, and notice to require the Respondent to offer reinstatement to employee Matthew Petruska. We shall also modify the judge's recommended Order and notice in accordance with *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001).

<sup>3</sup> All dates are 2000 unless otherwise specified.

On January 27, Boodt told Petruska that the conversation the day before was out of line and that he had been upset about what he had heard. He told Petruska that he was doing a great job and to keep it up. The judge rejected the Respondent's contention that Boodt's statements to Petruska effectively repudiated Boodt's unlawful conduct and that the statements should therefore not serve as evidence of antiunion animus. We agree with the judge.

Boodt's apology did not assure Petruska that the Respondent would not interfere with his Section 7 rights in the future, and in fact Petruska was unlawfully terminated fewer than 2 weeks later. Furthermore, Respondent President Brown met with employees the same day as Boodt's unlawful interrogation of Petruska and stated that the Respondent "is heading one way and if you are heading the other, we will shake hands as men and go our separate ways." The judge concluded that this remark, coming immediately after the unlawful discharges of employees Michael Fenrick and Michael Popovich, referred to the employees' union activities. Significantly, Brown had made a similar statement to Fenrick and Popovich at the time of their discharges. Thus, Boodt's "apology" was not made in a context free of other unfair labor practices.<sup>4</sup> Accordingly, we agree with the judge's conclusion that Boodt did not effectively repudiate his unlawful conduct.

2. With regard to the remedy for the unlawful discharges of employees Popovich and Petruska, the judge found that both of them, before their terminations, had plans to resign their employment that were sufficiently definitive to toll their backpay as of the date of their planned departures. The General Counsel excepts.

The judge relied upon *Bardaville Electric Co.*, 315 NLRB 759, 760 (1994). In that case, the Board denied the General Counsel's motion for summary judgment and ordered a hearing on the issues raised by the respondent regarding, *inter alia*, the appropriate backpay period. The Board noted evidence that before the discharge, the discriminatee had talked with a coworker about terminating his employment with the respondent and going to work for another specified employer. The Board concluded that, to remedy the respondent's unfair labor practice, restoring the "status that would have obtained if Respondent had committed no unfair labor practice" was required. Thus, if the discriminatee had intended to resign his employment, backpay would toll as of the date of his planned departure. *Id.* at 760. However, the Board noted that, the mere fact that the discriminatee had ob-

<sup>4</sup> See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

tained other employment after the discharge, would not establish that the discriminatee had a predischarge intention to resign his employment in the absence of the discharge and the backpay period would continue to run even after new employment was obtained. *Id.* at fn. 6.

Here, the General Counsel contends that the Respondent's preemptive termination of the employees created an uncertainty as to whether they would have resigned. Thus, the General Counsel, citing *United Aircraft Corp.*, 204 NLRB 1068 (1973), contends that any uncertainty and ambiguity must be resolved against the Respondent, the wrongdoer.

This remedial question implicates two statutory principles that must be applied. The first principle is that the remedy should restore the status that would have obtained if Respondent had committed no unfair labor practice. The second principle is that any uncertainty and ambiguity regarding the status that would have obtained without the unlawful conduct must be resolved against the Respondent, the wrongdoer who is responsible for the existence of the uncertainty and ambiguity. *United Aircraft Corp.*, *Id.* at 1068, 1069 (1973). In applying these principles we find merit to the General Counsel's exception as to Petruska, but not as to Popovich.

Popovich was discharged on January 11. He had specific and definitive plans to resign before he was unlawfully terminated. On January 11, he was planning to give notice of his resignation that very day. In fact, it was only because of circumstances beyond his control that he had not resigned a day earlier.<sup>5</sup> Thus, we agree with the judge's conclusion that Popovich was not entitled to reinstatement and that backpay should toll on the day of Popovich's planned departure.<sup>6</sup>

Petruska's situation was quite different. As we will explain, he had not made a decision to leave the Respondent before he was discharged, and his tentative plans were formed in the context of Respondent's unlawful conduct. Petruska testified that he had not made a decision to leave the Respondent before he was discharged. Petruska testified that, after a conversation with employee Popovich, he called Jay Mummy, an organizer for

Local Union 153 on January 10, and obtained information regarding the Union's wages and benefits. On January 11, employees Fenrick and Popovich were unlawfully terminated. On January 22, Petruska, along with some of the Respondent's other employees, met with Mummy. At this meeting Petruska signed a union authorization card and also signed up to take the placement test for the Union's apprenticeship program. Evidently, the test would determine his skill level, which in turn was to determine his rate of pay. In addition, Petruska discussed with Mummy what his employment opportunities would be if he went to work for a union contractor. Mummy indicated that those opportunities would depend on his test performance.

On January 25, the Respondent's president, Brown called Petruska into the office and, in the presence of Vice President Tim Gray, stated that he had a problem with the Union, but could not legally do anything about it. Brown also told Petruska that, if Petruska saw any union representatives at the jobsite, he would have to demand whether they had permission to be there or ask them to leave.

On January 26, Superintendent Boodt unlawfully interrogated Petruska and also suggested that Petruska should look for another job. Later on the same day, President Brown, in a meeting with all of the employees, made a statement to employees that, if they continued to engage in union activities, they and the Respondent would go separate ways. On February 2, Petruska took the placement test given by the Union.

On February 7, Respondent's vice president, Gray came into the warehouse and informed Petruska that he had heard that Petruska had been thinking about going union. Petruska admitted that he had been thinking about it. Gray then asked what Petruska planned on doing, and Petruska responded that he would probably give a 2 week notice in a couple of weeks. Gray immediately terminated Petruska.

Petruska testified that before his termination, he was waiting for his test results before making his decision whether to leave the Respondent's employ. Poor performance on the test would have precluded his resignation. When he was terminated, Petruska had not received the results of the test. As Petruska later learned, his results were satisfactory.

On this record, we reject the judge's finding that Petruska would have left his employment within 2 weeks of receiving the results of the test. First, at the time of his unlawful discharge, Petruska was contemplating giving notice of his resignation, but not doing so immediately. He was waiting for his test results, which he did not have. Nor had he secured a job at the time of his

<sup>5</sup> Popovich testified that he had planned to give his two-week notice on January 10, 2000, but the Respondent's president, Brown was not in the office. Thus, Popovich testified that on January 11, it was his intent to give notice of his resignation when he returned from the jobsite. However, while on his way to the jobsite, Popovich was recalled to the office. When he arrived at the office, he was terminated.

<sup>6</sup> See *Tomahawk Boat Mfg. Corp.*, 144 NLRB 1344, 1344, 1337 (1963). In that case discriminatee Heil had been unlawfully discharged on October 19, 1962, for conduct occurring on October 12, 1962. However, the judge found that the respondent had been actively engaged in plans to terminate Heil (unrelated to any protected activity) from September 14, 1962. The Board therefore tolled Heil's backpay as of February 4, 1963, the date on which he was replaced.

unlawful discharge. Thus, his plans for future employment were uncertain at the time of his discharge.

Further, Petruska's expressed intentions about possibly resigning were formed in a coercive context. Employees Popovich and Fenrick had already been unlawfully terminated before Petruska had even signed an authorization card or signed up for the placement test. Three days after Petruska met with Mummy, Brown told Petruska that he had a problem with the Union, and that, if Petruska saw union representatives on the jobsite he was to ask them to leave. On January 26, 4 days after Petruska met with Mummy, Superintendent Boodt unlawfully interrogated Petruska and suggested that Petruska look for another job. On the same day, Brown told the employees, in essence, that if they were involved with the Union they and the Respondent would go separate ways. Finally, Petruska was responding to an unlawful interrogation by Respondent's vice president, Gray when he revealed that he was thinking of resigning.<sup>7</sup> Consequently, Petruska's tentative plans to resign were tainted by the Respondent's unlawful conduct.<sup>8</sup>

Because of the tentative nature of Petruska's plans to give notice of his resignation at the time of his unlawful discharge, as well as the coercive context in which those intentions were formed and expressed, it is uncertain whether Petruska would have resigned if the Respondent had not committed unfair labor practices. In this situation, as in others, any uncertainty created by a wrongdoer's misconduct must be resolved against the wrongdoer—which the Respondent clearly was.<sup>9</sup> Our dissenting colleague would require the General Counsel to prove that the Respondent's misconduct actually contributed to a decision by Petruska to quit his job, and he finds that the misconduct "does not preclude the inference that an employee leaves the job to get a higher paying job." It was the Respondent as wrongdoer, however, who had the burden of negating the reasonable inference

that its misconduct affected Petruska. This the Respondent has failed to do.

We therefore shall order the Respondent to offer immediate reinstatement to employee Petruska.<sup>10</sup>

#### AMENDED REMEDY

Having found that the Respondent has violated the Act, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged employees Michael Fenrick, Brian Zache, and Matthew Petruska, we shall order the Respondent to offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent unlawfully discharged employee Michael Popovich 2 weeks prior to the time Popovich would have voluntarily terminated his employment. The Respondent also unlawfully accelerated the resignation of employee Robert Kellogg by 2 weeks. Therefore we have determined that the backpay period for each of these employees is limited to 2 weeks. We shall therefore order the Respondent to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of Popovich's discharge, or the date of Kellogg's accelerated termination, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra plus interest as computed in *New Horizons for the Retarded*, supra.<sup>11</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

<sup>7</sup> Gray stated: "I hear you are thinking of going to work for the union."

<sup>8</sup> See *Santa Fe Drilling Co.*, 171 NLRB 161 (1968), *enfd.* in relevant part, 416 F.2d 725, 733 (9th Cir. 1969). There the judge found that discriminatee Gardner "intended to terminate his employment the day after he was discriminatorily discharged, irrespective of the discrimination against him." Thus, the judge recommended that the respondent not be ordered to offer Gardner reinstatement. The Board did not agree, finding that Gardner's decision to seek other employment was related to the respondent's numerous unfair labor practices in violation of Sec. 8(a)(1), which would cause an employee "to be insecure and think in terms of other employment." *Id.* at 162.

<sup>9</sup> See, e.g., *Be-Lo Stores*, 336 NLRB 950, 953 (2001); *Wright Electric*, 334 NLRB 1031, 1032 (2001); *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000); *Alaska Pulp*, 326 NLRB 522, 523 (1998); *United Aircraft*, 204 NLRB 1068, 1069 (1973).

<sup>10</sup> See *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 733-734 (2d Cir. 1969), where the Court found that the Board's order of reinstatement of discriminatee Gardner was "well within its broad powers to order reinstatement to effectuate the policies of the Act."

<sup>11</sup> In the complaint, the General Counsel seeks a remedial provision requiring the Respondent "to reimburse any discriminatee entitled to a monetary award in this case for any extra federal and/or state income taxes that would or may result from the lump sum payment of the award." This aspect of the General Counsel's proposed Order would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), *enfd.* 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn 1 (2000). Because there has been no such briefing in this case, we decline to include this additional relief in the Order here. *Superior protection, Inc.*, 339 NLRB No. 118 (2003).

modified below and orders that the Respondent, Campbell Electric Co., Inc., Mishawaka, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Within 14 days from the date of this Order, offer Michael Fenrick, Brian Zache, and Matthew Petruska full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

2. Substitute the following for paragraph 2(d).

“(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., September 30, 2003

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I disagree with the majority’s decision to modify the judge’s remedial order regarding discriminatee Matthew Petruska. The judge found that Petruska, prior to the Respondent’s unlawful discharge of him, had formed a definite intention to resign his employment with the Respondent. The judge accordingly declined to order the Respondent to offer Petruska reinstatement, and the judge tolled the backpay period as of, the time that Petruska would have resigned his employment even if the discharge had not occurred.

The majority reverses the judge, ordering the Respondent to offer Petruska reinstatement and not tolling backpay. The majority finds that Petruska had formed only a tentative intention to resign his employment prior to his

discharge. The majority also says that any intention to resign was tainted by the Respondent’s unlawful conduct.

The evidence shows that prior to his discharge, Petruska had formed a definite intention to resign his employment. Petruska had taken a union apprenticeship placement test and was awaiting the results of the test at the time of his discharge. The Union had advised Petruska that if he left the Respondent and worked through the union hiring hall, the Union would provide Petruska immediate referrals and that his salary on Union hiring hall jobs would depend upon his score on the test. Petruska testified that, prior to his discharge, he had decided to leave the Respondent upon 2 weeks notice and to obtain work through the Union hiring hall if he received a satisfactory score on the test.<sup>1</sup>

As with any other case involving an unlawful discharge, the Board should remedy Petruska’s unlawful discharge by restoring the status quo ante the unlawful conduct. The status quo ante the unlawful conduct was that Petruska had taken the test, was awaiting receipt of his test score, and had decided to leave the Respondent for union hiring hall jobs, upon the condition that he receive a satisfactory score on the test. That condition was fulfilled, i.e., Petruska received a satisfactory score on the test. Accordingly, even if the discharge had not occurred, Petruska would have left the Respondent 2 weeks after receiving the test score. Thus, backpay should be tolled as of that date, and there should be no reinstatement.

My colleagues say that Petruska was awaiting his test results and he would *then* [emphasis added] make a decision on whether to leave the Respondent. In fact, he had decided to leave upon the condition that the test results were satisfactory. As noted, that condition was fulfilled, i.e., Petruska did, in fact, receive a satisfactory score on the test. Thus, there was no ambiguity concerning Petruska’s decision to leave the Respondent’s employ. Accordingly, this is not a case where a doubt must be resolved against the wrongdoer. Therefore, the Board’s remedial order should require only that the Respondent make Petruska whole through the date that Petruska would have left the Respondent even if he had not been discharged.

The majority argues that the Respondent engaged in unlawful conduct prior to Petruska’s discharge, that Petruska formed his intention to resign in the context of this unlawful conduct, and that his intention to resign

<sup>1</sup> There is an objective basis for determining a satisfactory test score that is, a satisfactory test score is a score that would give Petruska an apprenticeship rating with a salary higher than Petruska’s salary with the Respondent.

was tainted by the unlawful conduct. However, there is no evidence to support the majority's inference that the Respondent's unlawful conduct contributed to Petruska's decision to leave the Respondent for the union hiring hall jobs. Indeed, the more compelling inference is that Petruska's decision was driven by his desire to maximize his salary. It is not unusual, and indeed makes economic sense, for an employee to leave a lower paying job when a higher paying job is tendered. The mere fact that unlawful conduct had occurred does not preclude the inference that an employee leaves the job to get a higher paying job. Thus, the Respondent's unlawful conduct did not contribute to Petruska's decision to leave the Respondent, and the majority's reliance upon that conduct is misplaced.

The majority suggests that I would "require the General Counsel to prove that the Respondent's misconduct actually contributed to a decision by Petruska to quit his job" and that by doing so I have improperly shifted the burden of proof. The majority, however, commingles two separate burden-of-proof issues.

Where, as here, the General Counsel proves that a respondent employer has unlawfully discharged an employee, the Board infers that the unlawful discharge caused the employee to leave and will therefore order the usual reinstatement and backpay remedy. However, the Board allows the respondent employer to rebut this inference by proving that the employee would have left after the discharge anyway regardless of the unlawful discharge. The Respondent here met this burden of proof; it proved that Petruska would have quit his job even if the unlawful discharge had not occurred. At that juncture, the burden properly shifted to the General Counsel to show that the decision to quit was caused by the Respondent's unlawful conduct. Just as the General Counsel had to show that the discharge was unlawfully motivated, so too the General Counsel had to show that the decision to quit was unlawfully caused. That approach places the burden of proof on the person most likely to have the evidence as to why he quit, i.e. on the quitting employee. In addition, a contrary analysis would require the Respondent to prove a negative, i.e., that the decision to quit was *not* [emphasis added] caused by unlawful conduct.

Dated, Washington, D.C. September 30, 2003

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Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT direct our employees to ask union officials to leave the jobsites.

WE WILL NOT coercively interrogate our employees about their discussions of their wage rates with other employees.

WE WILL NOT inform our employees that they should look for another job because they discussed their wage rates with other employees.

WE WILL NOT inform our employees that they should not have received their last pay increase because they discussed their wage rates with other employees.

WE WILL NOT create the impression among employees that their union activity is futile and may result in their discharge by informing employees that the company is heading one way and if you are heading the other way the employees and Campbell Electric Co., Inc., will part company.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of Local Union 153, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT discharge our employees, force them to quit, or accelerate their resignations because of their support for the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days of the Board's Order, offer Michael Fenrick, Brian Zache, and Matthew Petruska full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, with-

out prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Fenrick, Michael Popovich, Brian Zache, Robert Kellogg and Matthew Petruska whole for any loss of earnings and other benefits suffered as a result of their discharges and Robert Kellogg's accelerated resignation.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or forced or accelerated resignations of Michael Fenrick, Michael Popovich, Brian Zache, Robert Kellogg and Matthew Petruska, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and/or forced or accelerated resignations will not be used against them in any way.

CAMPBELL ELECTRIC CO., INC. AND LOCAL  
UNION 153, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO

*Raifael W. Williams, Esq.*, for the General Counsel.

*S. Douglas Trolson, Esq.*, of Indianapolis, Indiana, for the Respondent.

*William C. Haase III*, Assistant Business Manager Local 153, of South Bend, Indiana, for the Charging Party.

DECISION\*

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in South Bend, Indiana, on November 1 and 2, 2000. The charge was filed by Local Union 153, International Brotherhood of Electrical Workers, AFL-CIO (the Union). The complaint alleges that Campbell Electric Co., Inc. (Respondent) violated Section 8(a)(3) and (1) of the Act by on about: January 11, 2000,<sup>1</sup> discharging employees Michael Fenrick and Michael Popovich; on February 7 discharging employee Matthew Petruska; on February 21 discharging employee Robert Kellogg on receipt of his 2-week advanced notification of resignation; and on February 24 discharging employee Brian Zache. The complaint also alleges that Respondent, through its agents and supervisors, made statements to employees independently violative of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been a commercial and industrial electrical contractor in the building and construction

industry at its facility in Mishawaka, Indiana, from where it annually performs services valued in excess of \$50,000 in States other than the State of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is an electrical contractor. Steve Brown and Tim Gray are its president and vice president, with each owning 50 percent of its stock.<sup>2</sup> Brown is in charge of sales and Gray is in charge of accounting. Respondent's superintendent, Gene Boodt, is in charge of manpower.<sup>3</sup> Respondent had a complement of about 20 electricians divided between journeymen and apprentices. Respondent pays for its electricians to participate in the 4-year ABC apprenticeship program leading to journeyman status. On occasion, some of Respondent's employees serve as leadmen or working foremen.<sup>4</sup> Brown testified Respondent has unwritten work rules which prohibit theft, require employees to report and leave at the appropriate time, and prohibit employees from disrespecting each other through the use of profanity. He testified that there are no rules as to employee resignation.

Brown testified that the Union was active at Respondent's jobsites in 1999. The Union held cookouts at the jobsites in the summer of 1999 and it convinced an employee to leave Respondent's employ to work for a Union contractor during that time. Brown testified that he could not stop the Union from holding the cookouts because it was private property, and the owners did not want to confront the Union. Brown testified that, in the fall of 1999, union representatives were coming on the jobsites and "trying to steal our employees, or convince our employees" to become members and work for union contractors by offering them \$3 more per hour. Similarly, Boodt testified that during the last half of 1999 and early 2000, union representatives were visiting the jobsites and were at Respondent's Southfield site quite often. Boodt testified as follows as to his knowledge of employees' union activity:

Q. Were you aware that any employees at Campbell Electric during late 1999 or early 2000, were you aware that any employees at Campbell Electric had either been talking to Union representatives or thinking about leaving Campbell or going to work for a Union contractor?

A. No. Not a bit.

Q. Had you heard any rumors to that effect?

A. Well, yeah, you hear a lot of rumors. I hear a lot of it from, you know, several of the other men that so and so

<sup>2</sup> Brown's father is a semiretired member of the Union. Prior to his employment with Respondent, Brown worked for union electrical contractors. Brown was not a union member at the time of the hearing.

<sup>3</sup> Respondent admits that Brown, Gray, and Boodt are statutory supervisors and agents.

<sup>4</sup> There is no contention that these employees are statutory supervisors.

\* Correction has been made according to an errata issued on April 10, 2001.

<sup>1</sup> All dates are in 2000 unless otherwise indicated.

might have been or whatever, but for them communicating that to me, no.

Q. Okay. What were the rumors that you had had heard? Did they include names?

A. No. Not specific names.

Respondent witness employee Mark Spodnick testified that he frequently saw union officials at the jobsites and that he would inform Boodt of this activity.

Brown testified that he received a call from the Union in December 1999 or January 2000 resulting in a meeting between Brown, Gray, Union Business Manager Ed Taff, and Assistant Business Manager William Haase III around 1 week after the call.<sup>5</sup> During the meeting, the union officials stated that the Union was distributing literature to Respondent's employees at the jobsites. They also gave Brown and Gray materials containing wage and benefit information which the union officials requested they review. Brown testified that he was told that the Union was going to continue to recruit Respondent's employees to work for union contractors. Taff testified that he told Brown that he had taken two of Respondent's employees into the Union and asked if there would be a problem with their vacation pay. While Brown testified that the Union did not tender a proposed contract, I have credited Taff's testimony that one of the topics of conversation was the Union's desire that Respondent become a union contractor.<sup>6</sup> Taff also credibly testified that he pointed out at the meeting that one of the Union's assets was its apprenticeship program.<sup>7</sup>

Taff's credited testimony reveals that Taff and Haase phoned Gray using a speaker phone in February. Gray was told that a couple of Respondent's employees were showing an interest in the Union's apprenticeship program and that Respondent could enter the program if it became a union contractor. Taff did not name any employees during the call.<sup>8</sup>

#### *B. The January 11 Discharge of Fenrick and Popovich*

Respondent hired Popovich in August 1994 and Fenrick in March 1995. Both received their journeyman's cards around May 1999, after completing the ABC apprenticeship program at Respondent's expense. Each served as leadmen while in Respondent's employ. Popovich's last written performance appraisal was dated May 26, 1998. He received ratings between satisfactory and superior, including superior ratings in atten-

dance and punctuality. Fenrick's last written performance appraisal is dated January 1997. Fenrick received satisfactory to superior ratings including superior ratings in coworker relations, attendance, and punctuality. Both employees received a performance raise on June 9, 1999, and Brown testified that they were Respondent's highest paid nonsupervisory personnel.

Fenrick credibly testified that, around mid-August 1999 while alone in the shop, Brown told him that if the shop decided to go union they would close the doors and open the next day under another name.<sup>9</sup> Brown did not specifically deny making these statements to Fenrick.<sup>10</sup> Fenrick's testimony reveals that towards the end of November 1999, Boodt came to Fenrick's jobsite. Boodt stated that there was a lot of union activity going on and that he did not think the employees should switch to the Union because a lot of them were overpaid, and the Union would not keep all its promises.

Popovich credibly testified that he had contacts with Union Organizer Jay Mummey in October and November 1999 at the Respondent's jobsites when he was given literature detailing the Union's wages and benefits. Popovich told both Fenrick and employee Matt Petruska about one of his conversations with Mummey.<sup>11</sup>

At Popovich's initiative, Mummey met with Popovich and Fenrick on January 8.<sup>12</sup> Popovich testified that they discussed the Union's wages, benefits, and its school. Popovich signed a union authorization card and told Mummey that he had decided to leave Respondent to work for a union contractor. Mummey told Popovich that when he started was dependent on when he gave notice to Respondent in that work was plentiful. Popovich testified that it was necessary for him to take a journeyman's

<sup>5</sup> Brown estimated that Taff and Haase were elected to office around June or July 1999.

<sup>6</sup> I do not find as credible Brown's attempt to portray the January meeting to be solely an effort by the Union to inform Respondent that the Union was attempting to recruit its employees. Rather, Brown admitted that he was given sufficient materials by the Union to formulate a wage and benefit comparison between that offered by Respondent and the Union. Brown's testimony that the Union asked him to review its wages and benefits buttresses Taff's credible testimony that the union officials asked Respondent to consider becoming a union contractor.

<sup>7</sup> Haase did not testify and Gray was not questioned about the substance of this meeting.

<sup>8</sup> Based on considerations of demeanor and the record as a whole, I have found Taff to be a more reliable witness than Gray and have credited his version of the phone call.

<sup>9</sup> I found Fenrick to be a credible witness based on considerations of demeanor, the specificity of his recollection, and evidence presented in the record as a whole. The initial charge in this matter was filed on April 11, 2000, therefore, any remarks made by Brown in August 1999, are outside the 6-month statutory 10(b) limitations period for a finding of a violation of the Act. However, these remarks can be considered as background evidence of animus towards union activity. See *Wilmington Fabricators, Inc.*, 332 NLRB 57, 60 fn. 6 (2000), and *Kaumograph Corp.*, 316 NLRB 793, 794 (1995).

<sup>10</sup> I do not credit Popovich's testimony that, during a company cookout in September 1999, Brown stated and that if the employees voted Union, Brown would close the shop and open it under another name. Brown denied discussing the Union during the cookout and General Counsel witnesses Fenrick, Petruska, Zache, and Kellogg failed to corroborate Popovich's testimony. I do not believe these employees would have forgotten such a statement if it was made by Brown at a staff meeting as Popovich alleged. My failure to credit this aspect of Popovich's testimony does not require me to discredit all his testimony which I found, as his memory permitted, to be reliable and for the most part corroborated by other witnesses. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

<sup>11</sup> Fenrick testified that he met Mummey around the same time period, when Mummey gave literature at a jobsite to Fenrick and employee Robert Kellogg.

<sup>12</sup> Mummey and Fenrick corroborated Popovich's testimony as to the January 8 meeting. Mummey and Popovich gave different dates as to their meetings prior to January 8. To the extent that their testimony varied, I have credited Popovich. I have concluded that the variances in their testimony were due to differing recollections rather than an intent to mislead.

exam before joining the Union to determine his rate of pay. Fenrick declined sign a union authorization card at the meeting. Popovich testified as follows as to the purpose of the January 8 meeting:

JUDGE FINE: Well, was he asking you to come work for a Union contractor or was he asking you to stay where you were or what was he asking you?

THE WITNESS: Well, no. He wasn't—he wasn't asking me to specifically stay at Campbell Electric and—if that is what you are saying—and try to get them to change over. Is that what—

....

Q. BY MR. WILLIAMS: At any point in time, did Jay Mummey ask you to leave Campbell Electric to work for a Union contractor?

A. No, he—he completely reiterated that it was my decision. I mean, he wasn't going to pressure me in one way or the other. You know, it was obviously—it was my decision.

JUDGE FINE: It was your decision to do what?

THE WITNESS: To—if I wanted to leave Campbell Electric and join the Union.

On Monday January 10, Popovich, Fenrick, and apprentice Jeff Foster were assigned to work 8 hours beginning at 2:30 p.m. at Respondent's MSC jobsite. Popovich and Fenrick credibly testified as to the following: Popovich and Fenrick discussed the Union in Foster's presence on January 10 in a breakroom at the MSC jobsite.<sup>13</sup> Popovich testified that he told Fenrick that he was going to give 2-weeks notice to leave Respondent. Fenrick stated that he was going to discuss things with his wife because he was not sure if he would join the Union. Fenrick testified that they told Foster about their January 8 meeting with Mummey.<sup>14</sup>

Fenrick's credited testimony reveals that: Fenrick was the leadman at the MSC jobsite on January 10. The assignment was to run buss duct overhead for approximately 250 feet. They had to cut and hang unistrut in order to hang the buss duct. They started work at about 2:30 p.m. and Fenrick and Popovich worked until about 10:15 or 10:30 p.m. Foster left early around a little after the 5:30 p.m. break. The lift needed to hang the unistrut would not work and its batteries would not take a charge. The employees attempted to get the lift operational between 2:30 to 5:30 p.m. by reading its manual and

taking the batteries out to inspect the connections. They also removed unistrut from a jobsite trailer. They spent 30 to 45 minutes in the breakroom, the equivalent to their lunch break. When they could not get lift working, it was Fenrick's decision to send Foster home because he concluded that the remaining task of cutting unistrut was not enough work for three people.<sup>15</sup> Popovich credibly testified that he told Foster to write 3 hours on his timecard.

Fenrick credibly testified that he and Popovich cut unistrut after Foster left using a Sawzall and a band saw. Fenrick estimated that the unistrut came in 20-foot lengths and that they cut it into four 5-foot lengths. Fenrick testified that some of the unistrut was cut by Foster at the jobsite before January 10, but that it was cut 3 inches too long as Fenrick had given Foster incorrect specifications. Foster had also not cut enough unistrut to complete the job. Fenrick and Popovich cut the unistrut that was still in 20-foot lengths and then they recut the ones that were cut the wrong size. Fenrick estimated that around 15 to 20 of the 20-foot pieces had been cut before they started and had to be recut. They also cut 10 to 20 additional pieces that had not previously been cut. It took around 4 to 5 hours to cut the unistrut.<sup>16</sup>

Popovich credibly testified that: On January 11, Popovich and Fenrick were scheduled to go to an Applebee's in Fort Wayne to change some lighting. When Popovich reported to the shop that morning, he told Boodt that he wanted to use a company truck to go to Ft. Wayne because Popovich was having trouble with his van. Boodt replied that Popovich could not take a company truck unless Popovich left the key to his van for Boodt's usage. Popovich stated that Boodt was not insured to drive his van. Boodt told Popovich that if he was going to be that way, he might as well find another job. Popovich handed Boodt the key to Popovich's van, slammed his fist down, and told Boodt this is "bullshit." Popovich and Fenrick then left in Respondent's truck. Popovich testified that Fenrick did not participate in the conversation with Boodt, that there was no screaming, and the term "bullshit" was the only profanity he used.<sup>17</sup>

<sup>15</sup> Fenrick testified that he called the shop around 5:30 or 6 p.m. to let Boodt know that the lift would not work. However, Boodt was not there. Fenrick testified that Popovich was working on the lift and did not know he placed the call.

<sup>16</sup> I have considered Respondent's contention that Popovich's testimony varied from Fenrick's as to amount of unistrut cut and the technique used to cut it. However, Popovich corroborated Fenrick's testimony in material respects in that he confirmed that there were problems with the lift, and that he and Fenrick cut unistrut after sending Foster home. While Popovich initially estimated that they cut around 2000 feet of unistrut, he later lessened his estimate to between 700 and 1000 feet. Fenrick's maximum estimate of the length of material cut, assuming that they worked on about 40 pieces of 20-foot unistrut, including both uncut and pre-cut pieces, would equal around 800 feet of unistrut. I have concluded, after considering the witnesses' demeanor, that the discrepancies in their testimony were due to Popovich's poorer recollection of the assignment, rather than an intent by either witness to fabricate. I have reached a similar conclusion as to variances in their testimony as to the method they used.

<sup>17</sup> Fenrick also testified that he did not participate in the conversation, that he was about 20 feet away, that he could hear what was said,

<sup>13</sup> Fenrick estimated that the conversation took place around 5:30 p.m., and Popovich thought it was around 4:30 or 5 p.m.

<sup>14</sup> Respondent called Foster, who remained its employee, as a witness. When asked if he was aware that Popovich and Fenrick had been talking to union representatives, Foster replied, "I wasn't sure. I mean, they hinted around and stuff, but I didn't know anything. They never said it to me for sure." When asked for a further explanation, Foster stated, "I didn't mean about the Union. I just meant that they hinted around about other jobs and stuff." Foster's initial response was to a question about Popovich and Fenrick's union activity and I did not find Foster's subsequent explanation, considering his demeanor, to be very convincing. Rather, I find it highly likely that Popovich and Fenrick discussed their January 8 meeting with Mummey during their next workday on January 10, and I have credited their testimony as to their conversation in Foster's presence as they reported it above.



Popovich and Fenrick drove Respondent's truck towards Fort Wayne. However, around 9 a.m. they were paged by Gray to return to the shop. When they arrived, Gray sent Fenrick into the office to talk to Brown. Fenrick credibly testified that Brown stated that he "wanted to make this short and to the point. The Company was going in one direction and I seemed to be going in another direction, and that there was nothing more he could do for me and that was my last day." Popovich's testimony reveals that he was then called in to see Brown, and Brown made a similar statement to him. Popovich testified that he shook Brown's hand and thanked him for the opportunity. Popovich did not tell Brown that he had intended to quit. After Brown discharged them, Gray told Popovich and Fenrick to fill out their last timecard. Fenrick and Popovich's credited testimony reveals that they had not been disciplined prior to their discharge, and that Fenrick had received praise for his work from Brown and Boodt including remarks made during the last few months of his employment.

#### 1. The testimony of Respondent's witnesses

Respondent witnesses Brown, Boodt, and Foster provided most of the testimony for Respondent as to the events leading to Fenrick and Popovich's termination. I found their testimony to be inconsistent and unreliable leading me to conclude that the reasons advanced for the discharges were pretextual.

Brown testified that: Brown discharged the employees, but Gray and Boodt participated in the decision on the morning of January 11. Fenrick was "terminated for falsifying timecards, for insubordination and for his unwillingness to work with others and his supervisor." The timecard that Fenrick allegedly falsified was the one for the work on January 10 at the MSC project. Fenrick "turned in eight hours and didn't work eight hours." Popovich was fired for falsification of his timecard and insubordination. This involved the same January 10 and 11 incidents for which Fenrick was discharged. When Brown informed Fenrick and Popovich that they were discharged he did not ask their side of the story.

It is reflected in Fenrick's personnel file that:

Mike was terminated due to the suspicion of falsification time records leaving job early. (As Steve passed him on the by pass one day early) his inability to work w/supervision & most other employees. The morn of termination, he was party an argument with Gene, after the argument Gene went to the jobsite w(h)ere they worked the prior evening to find no work had been completed. Mike was called back to shop & was told that he & the company were going in different directions & his employment was being terminated. . . . Mike then turned in a time card falsely filled out. Confirming the suspicion. Mike turned in 8 hours for Monday. No time was paid.

It is stated in Popovich's personnel file that:

Mike Popovich was terminated due to the suspicion of cheating on time cards (leaving jobs early), his inability to work with his supervisor. The morning of his termination he was party to an argument with Gene, after the argument Gene

went to the jobsite where they were to have worked the prior night to find no work had been completed. Mike was called back to the office and was told that he & the company were going in different directions & his employment was being terminated. He quickly shook Steve's hand thanked him. He turned in a time card that was false. Mike turned in 8 hours for Monday No time was paid.

While he maintained that Fenrick and Popovich were discharged, in part, for falsifying their January 10 timecards, Brown admitted they did not turn in the timecards until after they were discharged. Similarly, counsel for Respondent stated at the hearing, that "I don't think there is any contention by Respondent that these—that the timecards for Fenrick and Popovich for 10th were seen until after they were fired."

Brown testified that the work at the MSC site had to be completed in a couple of days. As a result, Brown and Gray spent a day cutting unistrut and had it delivered to the MSC site. On January 10, Fenrick and Popovich were supposed hang the pre-cut unistrut and drop thread down to hang buss duct. Brown testified that to his knowledge there was no reason that the employees could not complete the assignment. Brown testified that he spoke to Foster on January 11, after the discharges.<sup>18</sup> Foster told Brown that the employees spent January 10 in the breakroom and they were only at the site for 2 or 3 hours, although Foster was told to write 8 hours on his timecard. Brown testified that Foster also told him that they employees hung one piece of unistrut. Brown testified as follows as to his conversation with Foster:

JUDGE FINE: When you talked to Mr. Foster, did he mention there were any problems on the site?

THE WITNESS: No, he didn't say there were any problems.

JUDGE FINE: So there were no problems doing the work and no problems with the material or anything—

THE WITNESS: Your Honor, Mr. Gray and I personally supplied all the—had all the material ready for them because this was such a—

JUDGE FINE: Well, I am asking if the conversation you had with Mr. Foster—you might have thought it would have been easy—I am saying, did Mr. Foster say there were any problems actually doing the work?

THE WITNESS: No, absolutely not.

Foster's testimony undercut that of Brown in several respects concerning the work performed on January 10.<sup>19</sup> Contrary to Brown's claim that there was no problem at the site, Foster testified that there was a problem with the lift needed to hang the unistrut. Moreover, there was no claim by Foster that the employees hung any unistrut further contradicting Brown's version of what occurred. I find it unlikely that Foster would not have told Brown that there was a problem with the lift, if Brown had interviewed Foster as he claimed. In this regard, Boodt testified that when he questioned Foster later on during the day of January 11, Foster told him that there was a problem with the lift.

and that he did not hear any profanity used. Fenrick testified that they spoke in raised voices, but were not yelling.

<sup>18</sup> Boodt had spoken to Foster before the discharges.

<sup>19</sup> Foster was a first-year apprentice when he testified.

Foster's testimony also contradicted Brown's claim that Brown and Gray had pre-cut a large amount of unistrut and had it delivered to the MSC jobsite prior to January 10. Rather, Foster corroborated Fenrick that prior to, but close in time, to January 10 Foster had cut unistrut on the MSC job. Foster testified that he spent a half day cutting the material at the direction of either Fenrick or Popovich. Contrary to Brown's claim, when Foster was asked if he saw any other unistrut cut on that job besides the material he had cut, Foster testified, "I don't recall. I don't think so, but I'm not positive." I have concluded that if there was the large quantity of pre-cut unistrut on the job that Brown claimed, that Foster would have seen and remembered it.

Based on the foregoing, I do not credit Brown's testimony that he and Gray cut unistrut and had it delivered to the site prior to January 10. I have considered Respondent's witnesses' demeanor as well as Fenrick and Popovich's credible testimony that they spent the evening of January 10 cutting significant amounts of unistrut at the MSC jobsite. I note that Gray, although called as a witness, failed to corroborate Brown's testimony that he helped cut the unistrut. I have also considered Brown's testimony that, although he is a licensed master electrician, "I don't do hands on work," and Gray's testimony "that he was not an electrician."<sup>20</sup>

Foster's testimony was also internally inconsistent. He initially testified that after plugging in the lift on January 10, the employees remained in the breakroom for a couple of hours. They then they checked on the lift and Foster was told to go home and to write 8 hours on his timecard by both Popovich and Fenrick. Foster testified that they told him, "[T]hat we were all going home." However, Foster's testimony subsequently changed. When asked if Popovich and Fenrick said what they were going to do, Foster testified, "I don't remember for sure. As far as I know, they went home, too?" Foster testified that he did not see them go home.<sup>21</sup> When Foster was subsequently asked how he knew that Popovich and Fenrick left early, Foster testified that, "I didn't. I just assumed because they said that they were—you know, they told me to go home. We had left early times before and they had gone home." Foster then testified that Fenrick and Popovich did not say what they were going to do after Foster left.

Boodt and Foster also testified in an inconsistent fashion as to their initial conversation on January 11 as to what occurred at the MSC jobsite on January 10. Boodt testified that he spoke to Foster about the work at about 6 or 6:30 a.m. on January 11. Boodt testified that he asked Foster how the job went last night, and how much they accomplished. He testified that Foster

never really answered Boodt's question. However, Foster testified that when he reported to the shop the morning of January 11, Boodt only asked him what time they left work the night before, and Foster told him that he did not know. When asked if Boodt had asked him anything about the work at the site, Foster replied, "Nope."

Brown testified that he arrived at work at around 7:45 a.m. on January 11, and he was told by Boodt that an argument had taken place. Concerning Fenrick's alleged insubordination Brown testified that:

A. On the morning that he was fired, he was party to a very heated conversation with Gene Boodt, his supervisor, and things were said. I wasn't there so I don't know exactly what was said. I only know what I was told. I had other employees that were there that said it was so bad they walked out, that they were embarrassed for what was being said.

Q. What was supposedly so bad?

A. I wasn't there. I don't know other than the fact that there was a lot of profanity used.

Brown testified that profanity was used by both Fenrick and Popovich and that he received this information from Boodt and employees Chris Runyan and Mark Spodnick, who were present for the argument.<sup>22</sup> Concerning Fenrick, Brown testified that:

A. This was more so the icing on the cake, to be honest with you. He was now arguing. After I had—after he had asked me specifically to have a meeting about not having Gene be involved in his work, now I come into work and I find out from two employees and Gene that they are now engaging in an argument that was so bad that other employees left the shop.

Brown's claims as to the January 11 argument were undermined by Boodt's testimony. First, contrary to Brown, Boodt testified that Fenrick did not participate in the January 11 argument.<sup>23</sup> Boodt testified that the argument was with Popovich and that "Mr. Fenrick didn't say anything that morning at all." Boodt testified that Popovich became very aggressive when Boodt asked to use Popovich's van in exchange for using Boodt's company truck. When asked what Popovich said, Boodt testified:

THE WITNESS: Boy, it's hard to say exactly specifically what he said, but he just told me, "You ain't using my van." And I go, "Well, I need to use something." And he says, "Well, you're not using my van," and he was going to take his van home and not leave it parked there at the shop and I said, "Well, you know, I need a vehicle to get home. You're taking my vehicle. Can I at least drive it home?" And he basically said no, you're not taking my vehicle at all. And I said okay. So, I let it ride. I'm fairly

<sup>20</sup> Boodt gave a third version of the work to be performed on January 10 at the MSC job. He testified that not one piece of unistrut was mounted. Boodt initially testified that he thought that they had to cut the unistrut at the jobsite but then testified that either Brown or Gray had cut "a bunch" of the unistrut in the shop. Boodt testified that he did not think that there was a saw on the job to cut the unistrut. This assertion was contradicted Foster's testimony that he had spent a half day cutting unistrut at the site.

<sup>21</sup> Foster also testified that he did not overhear Fenrick and Popovich talking about the Union that evening, testimony that I have discredited for reasons set forth above.

<sup>22</sup> Spodnick did not testify about the argument on January 11, although he was called by Respondent to testify about other matters. Runyan was not called to testify.

<sup>23</sup> Fenrick and Popovich also testified that Fenrick did not argue with Boodt.

easy, I think, to let it ride, and he went on. He took my truck, took the credit card and then left.

JUDGE FINE: Did he say anything else?

THE WITNESS: Well, the only thing else that we had talked about was the amount of time that it may take to do the job. . . .

Boodt subsequently changed his testimony as to the argument with Popovich on the morning of January 11. Boodt testified that "when Popovich gets irate, he cusses a lot and there was a lot of bad language that morning." However, Boodt could not get more specific about what Popovich said. Boodt testified that he did not speak that language. When pressed he testified that Popovich "says God and damn and you know, just all the, you know."

I do not credit Boodt's belated claim that Popovich used profanity during their January 11 argument, other than the one phrase which Popovich admitted using. I have considered Boodt's demeanor and have concluded that if Popovich had used profanity to the extent to which Boodt and Brown claimed, Boodt would have reported it when he initially testified about the incident. I have concluded that the conversation occurred as Popovich and Fenrick credibly described it as set forth above. I also do not credit Brown's claim that he was told by Boodt and two employees that Fenrick participated in the argument on January 11. In this regard, Boodt confirmed Fenrick and Popovich's testimony that Fenrick was not involved in the dispute.

Boodt testified that on January 11, after Fenrick and Popovich left for Ft. Wayne, Boodt went to the MSC site to inspect the work that had been done the night before. Boodt testified that he arrived at the site at around 8 a.m., and he called Brown about 10 minutes later. Boodt's inspection of the site led him to conclude that there was nothing accomplished the night before. Boodt testified that he called Brown and told him, "[A] little bit of what had happened that morning that with Mr. Popovich and I said, you know, man, there's nothing that has been accomplished over here" and I said, you know, I asked him, I said, you know, "What do you want me to do?" He testified that Brown replied that he would "take care of this problem."<sup>24</sup>

Brown testified that Fenrick was discharged in part for an inability to work with other employees, including his supervisor. He testified that Fenrick initiated a conversation with Brown around 2 weeks before Fenrick's discharge in which Fenrick told him that he did not want to work with several named employees and that he did not want to work with Boodt. Fenrick requested that Boodt not be sent out to Fenrick's jobs. Brown

initially testified that he did not discipline Fenrick for this conversation. However, Brown subsequently testified that he considered his conversation with Fenrick to be a form of discipline because Brown told him how the job was going to be and that if Fenrick found it unacceptable he should find another job.

Fenrick testified that he had a meeting with Brown around November 1999. Fenrick testified that he asked Brown if it was necessary for Boodt to come out to the sites because Boodt would often not give the employees information necessary to perform their work. Fenrick testified that he did not think this was a good way to run the operation, but that he did not have any personal feelings against Boodt. Fenrick testified that no one was upset during his conversation with Brown, but Brown explained that he could not honor Fenrick's request. I have found Fenrick to be a more reliable witness than Brown and have credited Fenrick's description of the timing and content of this conversation.

Brown also testified that Boodt had told him that Boodt had suspected Fenrick of leaving early from jobs and that Boodt was watching Fenrick as a result. Brown testified that the truckdriver would show up to a job to deliver material or Boodt showed up at a job at 2 p.m. and Fenrick was supposed to work until 3:30 p.m. but was not there. Brown testified that the truckdriver reported similar incidents with Popovich. Brown testified that he also saw Fenrick on a bypass at 2 p.m. in November when Fenrick should have been at work. Boodt testified that there were two occasions when he showed up on the jobsite and Fenrick and Popovich were not there. However, Brown and Boodt testified that they never spoke to Fenrick or Popovich about their leaving early, and there was no claim that the employees were disciplined for it. Respondent also drew testimony from Foster and Spodnick as to allegations that Fenrick and Popovich had a habit of leaving jobsites early.

I do not credit the testimony of Respondent's witnesses that either Fenrick or Popovich were leaving their jobs early. I find Brown and Boodt's claims not to be credible in the face of their testimony that they never confronted the employees over the incidents. I also note that there was no claim by Brown or Boodt that prior to January 11 that either Foster or Spodnick had told them that Fenrick or Popovich were leaving work early. I did not find either Foster or Spodnick, who were in Respondent's employ at the time of their testimony, to be credible witnesses. I also do not credit a claim by Brown that he had to caution Fenrick and Popovich on several occasions concerning their attendance at the ABC apprenticeship program. I note that both employees maintained a B or better average, and that Respondent gave them merit increases around the time they completed the program. In short, I credit Fenrick and Popovich's testimony that they received no discipline while working for Respondent until the time of their discharge, and that they did not engage in conduct that warranted disciplinary action.

### *C. The February Terminations of Petruska, Zache, and Kellogg*

Petruska was hired in January 1998 and was an apprentice, who occasionally served as a lead man, at the time of his February 7 termination date. Petruska credibly testified as follows:

<sup>24</sup> Boodt testified that he first found out that there were problems with the lift on January 10, when he spoke with Foster a second time on January 11. At that time, Boodt asked Foster why no unistrut was put up, and he was told that the lift would not work. Boodt testified that he asked Foster what they had accomplished, and Foster said that they had not done anything, that they sat in the breakroom 2 hours on January 10 waiting for the lift to charge. Boodt testified that Foster told him that he left and that they all packed up their tools and went home. Boodt testified that he did not know if this conversation with Foster took place before the employee's discharge and there was no claim by Boodt that this information was conveyed to Brown or Gray prior to Fenrick and Popovich's discharge.

Petruska received the phone number from Popovich and called Mummey on January 10. They discussed and then Mummey sent him literature detailing the Union's wages and benefits. On January 11, Petruska told Kellogg and Zache about his conversation with Mummey. On January 20, Petruska called Mummey and set up a meeting at a truck stop for January 22. Petruska attended the meeting along with Popovich, Fenrick, Kellogg, Zache, and Mummey.<sup>25</sup> Mummey brought the same literature he had sent Petruska, and he answered questions about the Union. Petruska signed an authorization card at the January 22 meeting. He also signed to take the Union's apprenticeship placement exam to determine what year apprentice he would be if he left Campbell to work for a union contractor. Petruska credibly testified that, as of his February 7 discharge, he had not made a firm decision to leave Respondent's employ in that he was waiting for the results on the apprenticeship exam, which he did not receive prior to his discharge.<sup>26</sup>

Petruska's credited testimony reveals that on January 25, Brown called Petruska into the office. Gray was also there. Brown stated that he had a problem with the Union but legally he could not do anything about it. Brown also said that if Petruska told anybody that Brown had said this, Brown would deny it. Brown told Petruska that if he saw any union representatives on the job, to ask to see their permission to be on the jobsite, or ask them to leave. Brown also stated that he was going to have the same conversation with employee Mark Spodnick.

I have concluded that Brown's instruction to Petruska to ask union representatives to leave the jobsites violated Section 8(a)(1) of the Act. Brown did not specifically deny making this remark to Petruska, which the complaint alleges took place on about January 26.<sup>27</sup> Brown conceded, during his testimony, that the jobsites were not Respondent's property to control, as he testified that he could not prevent the Union from holding cookouts on the sites as the owners did not want to confront the Union. I conclude that Brown's directive to Petruska is conduct that would tend to restrain and coerce employees in the exercise of their Section 7 rights. In this regard, I have concluded for reasons set forth below that the Union's efforts of apprising employees of the benefits of union membership constituted protected Union activity, and that Respondent has failed to establish that it had a sufficient property interest to exclude the Union from the jobsites. See *Food For Less*, 318 NLRB 646 (1995), aff'd. in relevant part 95 F.3d 733 (8th Cir. 1996).

On the morning of January 26, Boodt came out to the TCI jobsite where Petruska was working. Petruska credibly testified that Boodt wanted to know who Petruska told how much he was earning, and how everyone had found out how much

money Petruska made. Petruska testified that Boodt said, "I know who you are talking to." Boodt also told Petruska that "if I were you, I would look for a different job." Boodt also told Petruska that he should not have received his last raise. Petruska stated in his pre-hearing affidavit that "[t]he following . . . morning, Boodt came out the TCI job and said to me alone that the conversation we had yesterday was out of line. I was just upset about what I had heard." Boodt went on to say, "[Y]ou're doing a great job. Keep it up."<sup>28</sup> I have concluded, as alleged in the complaint, that Boodt violated Section 8(a)(1) of the Act by interrogating Petruska about discussing his earnings with coworkers on January 26. It has long been held that the maintenance of a rule prohibiting employees from discussing wage rates among themselves violates Section 8(a)(1) of the Act. See *Jeanette Corp.*, 217 NLRB 653, 656 (1975), enf'd. 532 F.2d 916 (3d Cir. 1976), and *K Mart Corp.*, 297 NLRB 80 fn. 2 (1989). It is clear that interrogating an employee about such conduct would have the effect of coercing and restraining him from engaging in this protected activity.<sup>29</sup> I also do not find that Boodt's subsequent apology to Petruska was sufficient to remedy his unlawful conduct. In order to escape liability, a respondent's disavowal of unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. There also must be adequate publication and assurances given to employees that respondent will not violate the Act. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978). Accord: *Sam's Club*, 322 NLRB 8, 9 (1996), enf'd. 141 F.3d 653 (6th Cir. 1998). Boodt's apology was not unambiguous as he informed Petruska that he was upset by what he had heard. Moreover, I have concluded that Respondent has committed other unfair labor practices including unlawfully discharging Petruska.

#### 1. The January 26 meeting

Petruska and Zache testified, at the hearing, that they attended a meeting at Respondent's shop on January 26.<sup>30</sup> Brown conducted the meeting, which was attended by all of the employees, Gray and Boodt. They testified that Brown used a chart and stated that he had worked it out mathematically that Respondent's employees made less per hour but more money than a union journeyman because Respondent would work

<sup>28</sup> Boodt denied saying anything to Petruska about his discussing his wage rates with other employees. Based on considerations of demeanor, and his overall testimony, I did not find Boodt to be a very credible witness and I have credited Petruska as set forth above.

<sup>29</sup> I have concluded that the substance of this January 26 conversation was fully litigated, and that, although not alleged in the complaint, Boodt also violated Sec. 8(a)(1) of the Act by informing Petruska during the conversation that he should start looking for a different job, and impliedly threatened Petruska by telling him that he should not have received his last raise. See *Marshall Durban Poultry Co.*, 310 NLRB 68 fn. 1 (1993), enf'd. in relevant part 39 F.3d 1312 (5th Cir. 1994), and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977), where violations were found for matters not specifically alleged in the complaint but that were fully litigated.

<sup>30</sup> Zache only gave an estimate for the date of the meeting in his pre-hearing affidavit. However, I have found Petruska's memory for detail to be good, and I have concluded that the meeting did take place on January 26 as he testified.

<sup>25</sup> Mummey also testified that Petruska, Kellogg, and Zache attended the meeting.

<sup>26</sup> Petruska eventually rated as a third-year apprentice on the exam. He was rated as only a second-year apprentice while working for Respondent.

<sup>27</sup> Spodnick denied that he was given any instructions about union officials coming on the jobsites. However, considering his demeanor, I did not find Spodnick's testimony to be credible as he also testified that he would call Boodt to tell him if a union official came to the jobsites.

them more hours. Petruska testified that Brown also said that that he was sick of hearing about Mike and Mike, referring to Popovich and Fenrick, that if he lost any more employees to the Union due to them, he would sue them for slander.<sup>31</sup> Petruska testified that Brown also said that "Campbell Electric is heading one way and if you are heading the other, we will shake hands as men and go our separate ways."

The following exchange occurred as Zache was questioned about the meeting by counsel for the Acting General Counsel:

Q. Okay. And what else was said?

A. Well, that was about all.

Q. Did Mr. Brown make any more comments about the Union or the IBEW Local 153?

A. He said that if none of us were comfortable or if we didn't like where we were that we could leave now. If you didn't want to be an employee here and go with us that you could leave.

Counsel for the Acting General Counsel stated at the hearing that this remark by Brown was not being alleged as conduct violative of the Act, but that it constituted evidence of animus. Zache testified, on cross-examination, that Brown said, "[I]f you want to leave, okay, no hard feelings, you'll always have a home at Campbell Electric and we'll shake hands and part as gentlemen."

Kellogg testified that he could only recall one meeting where Brown expressed opposition to the Union and that was on January 26 when Brown compared Respondent's wages with the Union's wages and benefits. He testified that the firing of Popovich and Fenrick was discussed and that "Brown stated that they had chosen to go in one direction and the Company was going in another and if anybody felt to follow Mike and Mike, we would leave the Company with nothing more than a handshake." The following exchange occurred while Kellogg was questioned about the meeting by counsel for the Acting General Counsel:

Q. Okay. And was anything else said?

A. Not that I can remember.

Q. Do you know if anything else was said about the Union or the IBEW Local 153?

A. There was a statement that the shop would never become a Union shop.

Q. Okay. Was there anything else said?

A. No.

Kellogg subsequently reaffirmed his testimony that this meeting took place on January 26 rather than February 16, and counsel for the Acting General Counsel stated that the above-quoted remark was not being alleged a violation of the Act, but rather constituted evidence of animus.<sup>32</sup>

<sup>31</sup> I found Petruska to be a credible witness. However, this remark was not alleged in the complaint as violative of the Act, and I have concluded that its lawfulness was not fully litigated.

<sup>32</sup> Kellogg's his prehearing affidavit dated June 6, 2000, reflected that the meeting Brown held took place on February 16. However, Kellogg testified that the affidavit was incorrect and that the meeting was held on January 26. Kellogg testified, on cross-examination, that Brown said during the meeting that Fenrick and Popovich had been

Brown testified that he held a meeting with employees after Fenrick and Popovich were discharged, but he could not recall the date.<sup>33</sup> Brown used the information that the union officials had given him to present a wage and benefit comparison between that paid by Respondent and that being presented by the Union. Brown testified that he held the meeting because of rumors that he had heard that Fenrick and Popovich were spreading that the Union had stolen Respondent's employees, and that Respondent was going out of business. Brown testified that, after presenting the employees with the comparative wage and salary information, "I said, you guys, can make your own decision. If you want to stay, stay. If you want to leave, leave." Brown assured the employees that Respondent was not going out of business. Brown testified that he stated that Fenrick and Popovich had been fired for falsifying their timecard and that he told the employees that he was not going to talk about it anymore, but that everyone else was free to talk about it. Brown offered the employees copies of his notes showing the figures that he presented but no one accepted his offer. He explained that they had all already seen the information in that the Union had tried to recruit them and was "on every jobsite." Brown testified that he told employees if union representatives came on a site to try not to let them interfere with their work, that the employees were paid to do a job.<sup>34</sup>

Despite Kellogg's repeated testimony at the hearing that the only management meeting he attended concerning the Union occurred on January 26, counsel for the Acting General Counsel contends in his brief that the meeting took place on February 16, as set forth in Kellogg's prehearing affidavit. Based on that affidavit, which was entered into evidence over the counsel for the Acting General Counsel's objection, and certain testimony by Kellogg at the hearing, counsel for the Acting General Counsel maintains in his brief that Brown made remarks at a meeting on February 16, that are violative of Section 8(a)(1) of the Act, as alleged in paragraph 5(a)(ii) of the complaint.

I have concluded that there was only one staff meeting that Brown held concerning the Union and that it took place on January 26 as Petruska testified. I do not credit Kellogg's testimony at the hearing that Brown stated at the January 26 meeting that the shop would never become a union shop. I did not find Kellogg to be a very credible witness. First, Kellogg's testimony vacillated as to the date of the staff meeting between

stealing time from the Company in that they had gone to work for 2 or 3 hours and charged Respondent for an 8-hour day.

<sup>33</sup> Gray testified that there was one meeting that Brown held using his notes where the Union was discussed. Gray did not testify any further as to the substance of the meeting, and Boodt did not testify about it.

<sup>34</sup> While Boodt did not testify specifically about this meeting, he testified that Brown would hold meetings from time to time where he would tell employees that it was alright for union representatives to show up on Respondent's jobsites, but that the employees should only talk to them during their breaks. However, when asked if Brown stated this more than once, Boodt testified, "You know, I don't know because we don't talk about the Union that much. It's kind of one of those things like, I don't even talk to the men about it that much because it has nothing do with me, you know. My position is to put the men to work and make sure they are doing a good job, so I don't even talk to the guys about the Union."

his testimony at the hearing and that recorded in his prehearing affidavit with no explanation for the change by Kellogg. Moreover, Kellogg's testimony that Brown stated that Respondent would never become a union shop was not corroborated by either Petruska or Zache. Kellogg also did not testify at the hearing and I do not find that Brown stated at the meeting that any more discussion of Fenrick and Popovich and the employees would be gone, although there was such a statement in Kellogg's prehearing affidavit. Kellogg also stated in the affidavit, that Brown stated if we wanted to go union we can leave. However, he did not testify to this statement at the hearing, and I have concluded that the Acting General Counsel has failed to establish that these statements were made at the staff meeting. Accordingly, complaint paragraph 5(a)(ii)(A), (B), and (C) are dismissed.

I have concluded that Petruska, considering his demeanor and the specificity of his recollection, was a credible witness. I have credited his testimony that Brown stated, during the January 26 meeting, after reviewing Respondent and the Union's wages and benefits, that "Campbell Electric is heading one way and if you are heading the other, we will shake hands as men and go our separate ways."<sup>35</sup> In this regard, Brown testified that after presenting the employees with the comparative wage and salary information, "I said, you guys, can make your own decision. If you want to stay, stay. If you want to leave, leave." Brown testified that he made a similar statement to both Fenrick and Popovich at the time of their discharge as to that alleged by Petruska that he made at the staff meeting. I have concluded that Fenrick and Popovich's discharge was for the union activity and that the reasons advanced by Respondent for the discharge were pretextual. Accordingly, I have determined that Brown was giving Respondent's employees an ultimatum that they either work under the existing terms and conditions of employment, or they leave. I have concluded that, coming on the heels of Fenrick and Popovich's discharge, Brown's statement to employees that "Campbell Electric is heading one way and if you are heading the other, we will shake hands as men and go our separate ways," was in reference to employees' union activities and would tend to restrain and coerce employees in the exercise of their rights guaranteed by Section 7 of the Act, and was therefore violative of Section 8(a)(1) of the Act.<sup>36</sup>

<sup>35</sup> I do not find that Brown's statement at the meeting was in reference to Popovich and Fenrick's alleged stealing time as Respondent's counsel attempted to establish through his cross-examination of Kellogg. Kellogg's testimony on this point at the hearing differed from that contained in his pre-hearing affidavit and I have concluded that Kellogg was confused when he gave his response at the hearing.

<sup>36</sup> Petruska's testimony as to Brown's remarks at the January 26 meeting was not specifically alleged as unlawful in the complaint and counsel for the Acting General Counsel made statements at the hearing that Brown's statements at the meeting were not being alleged as violative of the Act. Nevertheless, the parties drew testimony from their witnesses as to the events at the January meeting, and they cross-examined opposing witnesses about the meeting. Respondent also briefed the issue as to the import of similar remarks alleged by Kellogg to be made by Brown at the January 26 meeting. Accordingly, I have concluded that the import of these remarks was fully litigated.

I do not credit Brown's testimony that he told employees at the January meeting that they were free to talk about Fenrick and Popovich. I also do not believe that he told employees that they should try not to let union representatives interfere with their work when they came on to the jobsites. Rather, I have concluded that Brown concocted this testimony in order to refute certain allegations in the outstanding complaint. In this regard, Brown's testimony was not corroborated by any other witness, and I did not find Brown's version of events to be credible. I also found Boodt's claims that he and Brown told employees that they could talk to union representatives during breaktime to be unreliable. Boodt at first testified that he heard Brown make these remarks at more than one meeting. However, when pressed on the number of times he heard Brown make these remarks, Boodt back tracked as if he had said something wrong, contending in effect that all discussions about the Union were taboo.

## 2. The February 7 discharge of Petruska

Petruska credibly testified to the following: On February 2, Respondent's employee Chris Runyan stated that he had heard that Petruska was talking to the Union. Petruska responded that he had not made a decision as to whether he would pursue work with the Union. Petruska told two other employees in the afternoon on February 2 at the TCI jobsite that he was going to take the Union's apprentice placement exam that evening. Petruska took the test as scheduled.

On February 7, Petruska reported to the shop and Boodt told him to stay in the warehouse. At around 7:30 a.m., Gray came into the warehouse and stated, "I heard you been thinking about going Union." Petruska responded that "I am not going to lie to you. I have been thinking about it." Gray asked what Petruska planned on doing, and Petruska said that he was not sure that he would probably give two weeks notice in a couple of weeks. Gray stated that "[I]t is not a Union or non-Union thing, but if you are planning on leaving anyway, we don't see investing any more money into you." Petruska asked Gray if it was his last day, and Gray responded, "Yeah, let's make it your last day." Petruska asked if he could go back inside to say goodbye to Boodt and Gray said, "Yeah, but you might want to hurry up because Steve is a little more hurt about this than I am." Petruska testified that he had not been placed by the Union at the time of his February 7 meeting with Gray. However, he found out that he was going to work for Thompson Electric the following day. Petruska testified that prior to his discharge that he did not have any conversations with Mummey as to how soon he could be placed.

Gray testified as follows: Gray had heard from other employees that Petruska was considering leaving Respondent. Gray called Petruska into the warehouse to "ask him if he was—if it was true what I heard, was he unhappy, was there anything, you know—if I had done anything wrong, what is going on?" Petruska stated that he had spent the day visiting the "Hands-On Training" facility, that he had already secured a position with another electrical contractor, and that it was in his best interest to leave Respondent. Gray testified that Petruska shook Gray's hand and offered his 2-week notice if it was required. Gray told Petruska that it was not, and then Petruska

left. Gray assumed that Petruska's new employer was a union contractor because of Petruska's mention of the Union's "Hands-On Training" facility. Gray testified that Petruska did not ask to stay the extra 2 weeks.

In addition to considerations of demeanor, I did not find Gray's testimony as to his meeting with Petruska to be very convincing. I have credited Petruska's testimony that a few days before his meeting with Gray, he had discussed with other employees that he was going to take the Union's apprenticeship placement exam. Yet, Gray contended that, although he initiated the meeting with Petruska to ask if he was leaving, that he only first only learned that Petruska was considering working for a union contractor by comments that Petruska made at their meeting. I find Gray's testimony as unworthy of belief and have credited Petruska in full. I have concluded that Gray's remark to Petruska at the meeting that "I heard you been thinking about going Union" constituted an unlawful interrogation and created the impression of surveillance of union activities in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(b)(i) and (ii).

### 3. The February 21 termination of Kellogg

Kellogg was hired in May 1998. He worked as an apprentice during the course of his employment, and on occasion served as a leadman. Mummey gave Kellogg union literature in August 1999 at one of Respondent's jobsites. Kellogg phoned Mummey in early January resulting in a meeting at the union hall on January 15, attended by Kellogg and Mummey. They discussed the Union's wages, benefits, and its apprenticeship program. Mummey told Kellogg that there was employment available for him at a union contractor when Kellogg wanted it. Kellogg signed a union authorization card at the meeting. Kellogg testified that Mummey told him to give Respondent 2 to 3 weeks notice. He also testified that he started working for a union contractor the next morning after he left Respondent's employ. Kellogg told Petruska about his meeting with Mummey on January 17 at around 6:30 a.m. in Respondent's parking lot. Kellogg testified that he had no further contact with Mummey after January 15.<sup>37</sup>

Kellogg testified that on February 21, in the afternoon, he went into Respondent's shop and Gray and Boodt were present. Kellogg stated that he was giving his 2week notice. Boodt stated, "You're really going to go to the Union?" Kellogg said, "Yes." Gray said that they already knew that this was going to be Kellogg's last day. Gray then corrected himself and said that they knew that it was going to be Kellogg's last 2 weeks. Gray said that Taff had called earlier in the day and told him that Kellogg was going to give 2 weeks notice. Gray then met with Boodt privately. Gray came out into the shop and stated that it was going to be Kellogg's last day. Gray stated that they had had bad luck with tools and materials missing, and people not working up to their normal standards. Kellogg testified that

<sup>37</sup> Kellogg did not have a very good recollection as to dates, and I have credited the testimony of Petruska and Mummey that Kellogg also attended the January 22 meeting at J.D.'s truckstop. I have considered that Zache also did not list Kellogg as having attended this meeting when Zache testified.

he did not intend to leave Respondent's employ on February 21.

Gray testified that, on his last day of employment, Kellogg came into the office and stated that he was quitting. Boodt was there. When Gray asked why, Kellogg stated that he had been to the "Hands on Training" facility, that he was considering relocating, and that he felt that it would be best to work for a union contractor because they could assist him in relocating. Kellogg offered Gray 2 weeks notice. Gray told him that it was not required and Kellogg left. Gray testified that he did not tell Kellogg that he could not stay for the 2 weeks only that it was not required. When asked if Kellogg wanted to stay for the 2 weeks could he have stayed, Gray responded that "[h]e probably could have." Boodt testified that prior to the end of Kellogg's employment, Boodt was not aware that he had been having conversations with union representatives. Boodt denied that he said anything about the Union to Kellogg.

As set forth above, I did not find Kellogg to be a particularly reliable witness. While I have concluded that the testimony of Gray and Boodt was also suspect, the Acting General Counsel maintains the burden of proof as to each allegation in the complaint. Accordingly, complaint paragraph 5(c)(ii), which counsel for the Acting General Counsel contends is based on Kellogg's testimony as to the remark on the part of Boodt at the February 21 meeting is dismissed.

### 4. The February 24 termination of Zache

Zache was hired in May 1998 and he was an apprentice at the time of his termination.<sup>38</sup> Zache signed a union authorization card during the January 22 truck stop meeting with Mummey where union pay, benefits, and job opportunities were discussed. Zache also testified that Mummey had previously told him about job opportunities through the Union.

Around a week or two after the January 22 meeting, Zache told Job Foreman Wayne Wootten, in the presence of employee Gabe Atkinson, that Zache had met Mummey and that Zache liked the union wages and benefits. Wootten stated that he was not interested. Zache met with Mummey in early February and further reviewed Zache's employment options with the Union. One day at work, Atkinson saw Zache wearing a union shirt. Atkinson told Wootten and they stated that they were going to call Boodt about it.

On February 23, Boodt told Zache that he knew who Zache had been talking to and that Brown wanted to see Zache in the shop.<sup>39</sup> Zache reported to Brown and Brown told him that he

<sup>38</sup> I have credited Zache's testimony as set forth below. I have considered Zache's demeanor and note that he testified in a specific fashion as to events that related in particular to his own employment relationship with Respondent. I have considered an inconsistency that Respondent points out between one aspect of Zache's testimony at the hearing and that contained in his affidavit pertaining to an alleged remark by Brown as to whether Zache could seek advice from Brown's father about the Union. However, I have concluded that this is a peripheral matter that did not detract from Zache's otherwise credible and straightforward testimony as to the events leading to his discharge.

<sup>39</sup> I credit Zache's testimony that Boodt made this remark to him over Boodt's denial. In this regard, Boodt testified that did not have any conversations with Zache about the Union, and then he went on to state, "I don't know if I have ever really had any communication with

knew that Zache had been talking to the Union.<sup>40</sup> Brown stated that he wanted to know what it would take for Zache to stay with Respondent.<sup>41</sup> Zache stated that he liked the relocation options with the Union that if he moved to another State, he would still be offered good pay and benefits. Brown showed Zache a book of ABC Contractors and said he would personally call and make sure that Zache got good pay if he ever traveled. Brown told Zache that he could take the rest of the day off to think about his decision as to whether he wanted to stay with Respondent and to let Brown know the next morning what Zache decided.

On February 24, when Zache reported to work, he told Brown that he still wanted to go with the Union. Zache told Brown that he would agree not to leave until Brown had a replacement for him. Zache testified that Brown became upset and told Zache, “[T]o get the fuck out because we made him sick.” After leaving Brown’s office, Zache told Wootten that “he said I was done and no longer with them.” Zache testified that he was discharged on February 24 and that he had intended to work beyond February 24 in that he still wanted to feel more comfortable about the decision to leave.

Brown testified that he called Zache in the office to promote him to leadman. Zache stated that he was thinking of leaving Respondent because he was impressed with the Union’s “Hands-On Training” facility. Zache also told Brown that he was thinking about moving, and that he could be placed anywhere if he was a member of the Union. Brown told Zache that the ABC apprentice program had similar transferability options. The conversation ended with Zache going to go home, think it over, and report to Brown the next day. Brown testified that Zache came in the next day and told him that he quit and that “[h]e was done.” Brown testified that after Zache quit, he asked Brown if Brown wanted him to stay for another 2 weeks, to which Brown replied that this was not necessary. Brown testified that he became upset because he was losing a valuable employee who he had invested a lot of time and money in and that he told Zache to “get the fuck out of my office.” Yet, Brown claimed that he assumed Zache would return to work. I have credited Zache over Brown to the extent that there were variances in their testimony as to the two meetings. I did not find Brown to be a particularly reliable witness and I find it

likely in view of Zache’s credited testimony that either Wootten or Atkinson, or both, reported to Respondent’s officials that Zache had shown an interest in the Union.

Respondent also called Wootten, who remained in its employ, to testify. Wootten admitted that Zache told him that he had had conversations with union representatives, but he denied reporting this to management. I did not find Wootten’s denial to be persuasive. In this regard, Wootten testified that he refused to shake Zache’s hand when he found out that he was leaving since Wootten was training him and he “thought he did me wrong by leaving.” Wootten assumed that Zache was to go to work with the Union because of Zache’s conversations with Mummey. I have concluded that Wootten was in agreement with Respondent’s antiunion stand and that he was loyal to management and therefore was likely to report Zache’s interest in the Union. I have also credited Zache’s testimony that Brown told him that he knew Zache had been talking to the Union at the outset of their February 23 meeting.

*D. Analysis and Conclusions as to the Terminations of Fenrick, Popovich, Petruska, Kellogg, and Zache*

1. Applicable legal principles

I disagree with Respondent’s contention that the employees named in the complaint were not engaged in activity protected by the Act because they were being recruited by the Union to work for union contractors. Section 8(f) of the Act allows a construction industry employer to enter a collective-bargaining agreement with a labor organization although the majority status of that labor organization has not been established. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988). In *M. J. Mechanical Services*, 325 NLRB 1098, 1106–1107 (1998), the Board rejected the respondent employer’s contention that it was entitled to discriminate against union applicants because their activities would be in accord with a stated union objective of depriving the employer of employees. In that case, the union had persuaded one of employer’s employees to become its member and then assigned that employee to work for a union contractor. The Board approved the following rationale in rejecting the respondent’s defense:

In trying to convince MJ employees to join Local 46, the salts were exercising rights granted to them by Section 7 of the Act. There is no suggestion that they coerced, interfered with, or restrained MJ employees in the exercise of their rights. The salts merely told MJ employees about the benefits of belonging to the Union and referred them to the union hall. One apparently decided that joining was in his best interests and the other reached the opposite conclusion.

Local 46’s objectives are no different from that of any union. Its members are engaging in concerted activity to protect their wage rates and benefits. Their objective is to prevent contractors such as Respondent from threatening these benefits by restricting the supply of labor it can obtain at rates below that set forth in its collective-bargaining agreements. As Chief Justice Stone noted, “[a] combina-

any of the men about the Union.” Boedt’s testimony as to his conversations with employees about the Union vacillated during the hearing and was not worthy of belief. However, counsel for the Acting General Counsel stated at the hearing that this remark was not alleged as a violation of the Act and since it is similar to other violations that I have found, it will be remedied in the recommended notice without the need to find that it independently violated the Act.

<sup>40</sup> I have concluded that by making this statement, Brown interrogated Zache and created the impression of surveillance of his union activities in violation of Sec. 8(a)(1) of the Act as alleged in par. 5(a)(iii)(A) and (C) of the complaint.

<sup>41</sup> Counsel for the Acting General Counsel contends that, by making this remark, Brown promised Zache unspecified benefits to abandon his union activities in violation of Sec. 8(a)(1) of the Act. I do not find this to be the case. Rather, Brown asked Zache what it would take for him to remain in Respondent’s employ as opposed to leaving to work for a union contractor. Accordingly, par. 5(a)(iii)(C) of the complaint is dismissed.



tion of employees necessarily restrains competition among themselves in the sale of their services to the employer.” *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502 (1941). The National Labor Relations Act allows employees to collectively attempt to restrict the labor supply in such a manner. If the alleged discriminatees herein convince MJ employees to join the Union and to withhold their labor from MJ unless MJ pays union scale, they would be exercising rights explicitly granted by the Act.

Moreover, Respondent is simply incorrect in arguing that Local 46 was trying to drive it out of Rochester by depriving it of labor. It is abundantly clear that if MJ entered into an 8(f) agreement with the Union, it would have been provided with an adequate supply of labor to complete any project it undertook in the Rochester area. The issue between MJ and the Union was not whether Respondent worked in Rochester, it was whether Respondent worked in Rochester with employees who made significantly less in wages and benefits than union employees.

In the instant case, the credited evidence reveals that union officials met with Brown and Gray in late December 1999, or early January. During that meeting, they gave the company officials materials detailing the Union’s wage and benefit rates and asked them to review the materials with an eye toward Respondent becoming a union contractor. Taff and Haase placed a followup call to Gray in February telling Gray that some of Respondent’s employees were interested in the Union’s apprenticeship program, and again requested that Respondent become a union contractor. These entreaties were rejected by Respondent. Rather, Brown held a meeting with employees on January 26, where he compared Respondent’s and the Union’s wages and benefits and gave the employees an ultimatum of working for Respondent at status quo, or leaving to join the Union. I do not find that the Union was attempting to drive Respondent out of business here. Rather, it was attempting to restrict its supply of labor until it such time as it became a union contractor. Moreover, the discriminatees were not acting only out of self-interest as Respondent contends. Rather, Popovich informed Fenrick and Petruska of his conversation with Mummey and Popovich and Fenrick met with Mummey together on January 8 at which time Mummey discussed the Union’s wages and benefits. Similarly, Kellogg, Zache, Petruska, Popovich, and Fenrick met with Mummey on January 22 again to discuss the benefits of union membership and employment at union rates.

Respondent cites *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975); *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873, 877 (7th Cir. 1966); and *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), in support of its contention that the employees at issue here were not engaged in protected activity. Respondent asserts that in order for there to be protected activity the conduct must involve the employees’ relationship with their employer and there must be a labor dispute. It asserts that there was no labor dispute here in that the employees just decided to end their relationship with Respondent in favor of being employed by another company. It contends that there was no effort by the employees to

change terms and conditions of their employment rather they were abandoning that employment. In *NLRB v. Leslie Metal Arts Co.*, supra., the court upheld the Board in concluding that employees were involved in protected activity when they engaged in a protest of the conduct of another employee that involved plant safety. In *G & W Electric Specialty Co. v. NLRB*, supra, the court reversed the Board and found that an employee was not engaged in protected activity when he was discharged based on a dispute with a credit union that was facilitated by but not operated by the respondent employer. It was concluded there that the dispute did not have any significant connection to the employee’s employment relationship with the company. In *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, supra, the court enforced the Board’s determination that union represented employees were engaged in protected conduct when they engaged in a 15-minute protest during worktime to apply pressure to the employer to negotiate a collective-bargaining agreement with their union representative. The main issue there was whether the employees were engaged in a partial or intermittent strike which would have removed their conduct from the protection of the Act.

Section 7 of the Act, provides in pertinent part that, “Employees shall have the right to self-organization, to form, join, or assist labor organizations.” Section 8(a)(3) of the Act provides that it is an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” All of the employees here had been talking to the Union and had either signed authorization cards or were contemplating signing authorizing cards to receive the benefits of union representation at the time that Respondent severed their employment relationship. Respondent’s discharging them for that reason strikes at the very heart of the Act’s protection. Moreover, there was a labor dispute here as the Union was involved in a campaign against Respondent in an effort to pressure Respondent into becoming a union contractor. The work related grievance was Respondent’s refusal to offer union wages and benefits, which Respondent could have remedied by entering a union contract. Brown was keenly aware of this when he held the meeting on January 26 telling the employees that they had a choice between remaining Respondent’s employees under its existing wage and benefit package, or leaving to work for union contractors. Gray was aware of it in February when Taff told him that some of Respondent’s employees were interested in the Union’s apprenticeship program, and that Respondent could participate in the program if it became a union contractor. Brown was reminded of this when Zache told him that he was contemplating leaving because of the relocation benefits union membership offered. Moreover, as set forth above, the employees did not act on an individual basis in pursuit of union wages and benefits. Rather, they informed coworkers of their contacts with the Union and acted in concert in their meetings with Mummey. Accordingly, I have concluded that all of the alleged discriminatees were engaged in union activity protected by the Act at the time that their employment relationship was severed by Respondent.

## 2. The January 11 discharge of Fenrick and Popovich

The General Counsel has the burden of establishing a prima facie case sufficient to support an inference that union activity was a motivating factor in an employer's adverse personnel action towards an employee. Once this is established, the burden shifts to Respondent to establish that it would have taken the same action even absent the employee's participation in protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). An inference of knowledge of union activity, animus, and unlawful motivation may be drawn from circumstantial as well as direct evidence. See *Howard's Sheet Metal, Inc.*, 333 NLRB 361, 364 (2001). The following principles were set forth in *West Motor Freight of Pennsylvania*, 331 NLRB 831, 837 (2000):

The Company's submission of pretextual reasons for Morehead's discharge supports an inference that its real reason was something different. The Board has held that "it is well settled that knowledge of the employee's protected activity need not be established directly, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Hospital San Pablo, Inc.*, 327 NLRB [300] (1998). The Board elucidated some of the circumstantial evidence in a later case. "We may infer knowledge based on such circumstantial evidence as the timing of the alleged discriminatory actions; Respondent's general knowledge of its employees' union activities, and the pretextual reasons given for the adverse personnel actions." *North Atlantic Medical Services*, 329 NLRB [85, 85-86] (1999). In a case where the employer discharged employees 9 days after the advent of the union movement, the Court of Appeals for the Second Circuit deemed "the stunningly obvious timing of the layoffs," together with the other evidence, to be sufficient to warrant an inference of discriminatory motivation. *NLRB v. Novelty Products Co.*, 424 F.2d 748, 750 (2d Cir. 1970).

Brown's testimony revealed that there was a change in union leadership around July 1999 and that the Union was holding cookouts at Respondent's jobsites in the summer of that year. Brown testified that, in the fall of 1999, union officials were coming to Respondent's jobsites and attempting to steal Respondent's employees. Similarly, Boodt testified that he was aware of the Union's jobsite visits during the second half of 1999 and early 2000. When asked if he had heard rumors as to the employees union activity, Boodt testified, "[Y]ou hear a lot of rumors. I hear a lot of it from, you know, several of the other men that so and so might have been or whatever."<sup>42</sup> Respondent witness Spodnick testified that he saw union officials at the jobsites all the time and that he would let Boodt know of their presence.

The credited testimony reveals that in mid-August 1999, Brown told Fenrick that if the shop decided to go Union they would close the doors the next day and open up under another name. In later November 1999, Boodt told Fenrick there is a lot of union activity going on and that he did not think that it

was in the employees interest to switch over to the Union because they did not keep their promises. In late December 1999, or early January, Brown received a call from Taff or Haase, and they met around a week later. During the meeting Brown was presented with information concerning the Union's wage and benefit package with the suggestion that Respondent become a union contractor.

On Saturday, January 8, Fenrick and Popovich, two of Respondent's senior and most experienced electricians, met with Union Official Mummey at which time Popovich signed a union card and committed to working for a union contractor. On the next workday, Monday, January 10, Fenrick and Popovich informed Foster, a short-term apprentice, while they were working at Respondent's MSC jobsite, of their meeting with Mummey and of Popovich's intent to seek employment with a union contractor. While working at the MSC jobsite, the lift necessary to complete the planned assignment was not operational resulting in Fenrick, the lead person on the job, sending Foster home after 3 hours of work. Fenrick and Popovich's credited testimony reveals that they worked a full 8-hour shift on January 10, and that after Foster left they cut unistrut. Foster was also told to only mark 3 hours on his timecard.

On January 11, Brown discharged Fenrick and Popovich for allegedly submitting a false timecard for work performed on January 10, for being insubordinate to Boodt in that they were supposed to have engaged in a profanity laced argument with Boodt on January 11, and for allegedly leaving the jobsites early. I have concluded that claims advanced by Respondent as to Fenrick and Popovich's alleged transgressions are pretextual. First, Respondent concedes that the employees did not submit their timecards for the work performed on January 10 until after they were discharged. I have also credited the employees' testimony that they did work 8 hours on that date. Second, Brown testified that Boodt and two employees had reported to him that both Fenrick and Popovich had engaged in a profanity laced argument with Boodt on January 11. However, the testimony of Boodt, Fenrick, and Popovich reveals that Fenrick did not participate in the argument which was just between Boodt and Popovich. The credited testimony also reveals that there was also a minimum of profanity used during the exchange and that Popovich relented to Boodt's demand that Popovich give him the keys to Popovich's personal vehicle. Moreover, Brown testified that he periodically received complaints from customers that they had overheard employees "cussing on the job." Brown testified that this is "typical of construction," and that the only discipline the employees received was that they were talked to about it. Brown's testimony thus establishes that he treated Fenrick and Popovich in a disparate fashion to other employees in terms of the use of profanity on the job. In this regard, Fenrick used none and Popovich used a minimal amount but both were discharged. I further find as incredible Respondent's claims that they had a concern that Fenrick and Popovich had over the last several months of their employment been leaving the jobs early. In this regard, there was an admission that the two employees were never spoken to about this alleged problem.

In sum, Brown fired two senior and experienced employees, who Respondent had just finished having trained as journey-

<sup>42</sup> I have concluded that Boodt's subsequent denial that employee names were mentioned along with these rumors to be unworthy of belief.

man at its expense. Brown did this in the face of a tight labor market without informing the employees of the reasons for their discharge or giving them a chance to explain their side of events. Respondent's actions and its haste to sever Fenrick and Popovich's employment convinces me that Respondent was motivated by reasons other than their alleged conduct which I have found to be pretextual. The timing of the discharge, 2 days after the employees met with the Union and Popovich signed a union card, the animus Respondent has displayed, the disparate treatment noted, the abrupt nature of Respondent's actions, and the sham reasons advanced for the discharge leads me to conclude that Foster told Respondent's officials of Popovich and Fenrick's union activity and that they were discharged as a result in violation of Section 8(a)(1) and (3) of the Act. This conclusion is confirmed by Brown's sole explanation to the Fenrick and Popovich at the time of their discharge that they were going in one direction and Respondent was going in another.

### 2. The February 7 discharge of Petruska

Petruska signed a union card on January 22 and he signed up to take the Union's apprenticeship placement test on that date during a meeting with Mummey, Popovich, Fenrick, Zache, and Kellogg. On January 25, Brown told Petruska, in Gray's presence, that Brown had a problem with the Union but could not do anything about it. He also told Petruska that if he saw any union representatives on the jobsites that he should tell them to leave. On January 26, Boodt came out to Petruska's jobsite, questioned him as to who he had been discussing his wage rate with, told him that he knew who Petruska had been talking to, that Petruska did not deserve his last pay increase, and that Petruska should be looking for another job. On the afternoon of January 26, Brown held a meeting where he compared the benefits of the Union and Respondent, stated that Respondent was heading one way, and if you are heading another, that they would shake hands and go their separate ways. On February 2, Petruska discussed his union activities with three of Respondent's employees and told two employees that he was going to take the Union's apprenticeship exam that evening.

On February 7, Boodt told Petruska to remain in the warehouse, and thereafter Gray told him that he had heard that Petruska was thinking of going Union. When Petruska responded that he was thinking about it, and that he would probably give 2 weeks notice in a couple of weeks, Gray told him that if he was planning on leaving anyway, Respondent did not want to invest any more money in him and that February 7 was his last day.

Respondent contends that an employer has a right to terminate an employee who is contemplating leaving to work for a competitor when it has notice of the employee's intent. However, the Board has held that whether an employer has unlawfully terminated an employee or accelerated their resignation must be analyzed under the standards of *Wright Line*, supra. See *FiveCAP, Inc.*, 331 NLRB 1165, 1185 (2000), and *Vencor Hospital-Los Angeles*, 324 NLRB 234 (1997). The credited evidence here shows that Gray initiated a meeting with Petruska in which he interrogated him about his union activi-

ties, and as a result of Gray's questioning was told that Petruska may give his 2 weeks notice in a couple of weeks. While Respondent had no policy requiring 2 weeks notice, Gray testified concerning Kellogg that if he had asked to stay an extra 2 weeks that "[h]e probably could have." I therefore have concluded that Respondent also had no policy of rejecting employees 2-week notice before separation. The record shows that Gray initiated the meeting, that he had knowledge of Petruska's union activities, that Respondent's officials harbored animus towards those activities, and that Gray prematurely severed Petruska's employment during a tight labor market with no credible business justification for doing so. Accordingly, I have concluded that Respondent discharged Petruska in violation of Section 8(a)(3) and (1) of the Act.

### 3. The February 21 termination of Kellogg

As set forth above, I did not find Kellogg to be the most reliable of witnesses. However, both he and Gray testified that on February 24, he told Gray and Booth that he was quitting and offered 2 weeks notice. Gray admits that Kellogg told him that Kellogg thought that it would be in his best interest to work for a union contractor. Kellogg testified that after he stated that he wanted to give his 2-week notice, that Gray met privately with Boodt and then told Kellogg that it was going to be his last day. Gray testified that he just told Kellogg that a 2-week notice was not required and then Kellogg left. However, Gray testified, as set forth above, that if Kellogg wanted to stay 2 weeks he probably could have. I have concluded that Kellogg offered Respondent 2 additional weeks of work at a time of a tight labor market, that Respondent knew of Kellogg's union activity, had animus towards it, and that Respondent has failed to establish a legitimate business justification for its refusal to allow Kellogg to work the additional 2 weeks. Accordingly, under the standards set forth in *Wright Line*, supra, Respondent accelerated Kellogg's resignation in violation of Section 8(a)(3) and (1) of the Act.

### 4. The February 24 termination of Zache

Zache signed a union card on January 22, and told Foreman Wootten and coworker Atkinson that he had been thinking about joining the Union. On February 23, Boodt told Zache that he knew who he had been talking to and instructed Zache to see Brown in the shop. Brown told Zache that he knew that he had been talking to the Union, and wanted to know what it would take to get Zache to stay with Respondent. Zache stated that he liked the relocation options with the Union, to which Brown stated that the ABC contractors also had relocation options. Brown told Zache to let Brown know the next morning what he had decided. Zache's credited testimony reveals that on February 24, Zache told Brown that he still wanted to go Union. Zache told Brown that he would not leave until he had a replacement. However, Brown told Zache "[T]o get the fuck out because we made him sick." Brown testified that Zache told him that he quit, but Brown also admitted that he rejected Zache's offer to work an extra 2 weeks. Brown testified that he told Zache to "[G]et the fuck out of my office." Zache credibly testified that he was discharged on February 24, in that he wanted to continue working for Respondent because he was not comfortable at that time with his decision to leave.

I have concluded that, under the standards set forth in *Wright Line*, supra, that Brown unlawfully discharged Zache on February 24. The testimony establishes that Brown initiated a meeting with Zache and then forced him to make a decision as to whether he was going to remain working for Respondent or leave to work for a union contractor at a time at which Zache was not ready to make such a decision. The evidence shows that Brown knew of Zache's union activities, harbored animus towards those activities, and Respondent has shown no business justification for forcing Zache, an admittedly valuable employee, to leave its employ at the time of a tight labor market. I have therefore concluded that Respondent discharged Zache in violation of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent Campbell Electric Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union 153, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Instructing employees to ask union officials to leave Respondent's jobsites.

(b) Coercively interrogating employees about their discussions of their wage rates with other employees.

(c) Informing employees that they should look for another job because they discussed their wage rates with other employees.

(d) Informing employees that they should not have received their last pay increase because they discussed their wage rates with other employees.

(e) Creating the impression among employees that union activity at Respondent was futile and may result in their discharge by informing employees that the Company is heading one way and if you are heading the other way the employees and Respondent would part company.

(f) Coercively interrogating employees concerning their union activities.

(g) Creating the impression of surveillance of employees union activities.

4. Respondent violated Section 8(a)(3) and (1) of the Act by: discharging Michael Fenrick and Michael Popovich on January 11, 2000; discharging Matthew Petruska on February 7, 2000; accelerating the resignation of Robert Kellogg on February 21, 2000; and by discharging Brian Zache on February 24, 2000.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged employees Michael Fenrick,<sup>43</sup> and Brian Zache,<sup>44</sup> it must offer them rein-

statement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>45</sup>

While I have concluded that Respondent unlawfully discharged employee Michael Popovich I am not recommending that Respondent be required to offer Popovich reinstatement, and I am recommending that Popovich's backpay be limited to a 2-week period following his January 11 discharge. In this regard, Popovich credibly testified that he had determined that he was going to quit his Respondent's employ, and that he was going to give 2 weeks notice on January 11, the date of his discharge. The Board has held that in order to remedy a respondent's unfair labor practice, the Board must restore the status that would have obtained if Respondent had committed no unfair labor practice and that if an employee had determined to quit even if there was no unfair labor practice then backpay would toll at the date of the employee's planned departure. See *Bardaville Electric Co.*, 315 NLRB 759, 760 (1994).

I am similarly only recommending limited backpay without reinstatement for Matthew Petruska, who I have concluded that Respondent unlawfully discharged on February 7, 2000. In this regard, Petruska's testimony revealed that he planned to leave Respondent regardless of Respondent's unfair labor practices. Petruska's credited testimony reveals that on February 2, 2000,

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Union Official Mummey, Fenrick had not decided to leave Respondent's employ at the time of his January 11, 2000 discharge.

<sup>44</sup> Zache signed a union card on January 22, 2000, but he remained in Respondent's employ for over a month until February 23, when Brown told him that he knew Zache was talking to the Union, asked him what it would take for him to stay, and gave him until the next day to make up his mind whether to stay or leave. On the morning of February 24, Zache told Brown that he still wanted to go Union. Brown rejected Zache's offer of 2 weeks notice, and told him in unceremonious fashion to get out of his office. I have concluded that Zache had no definite plans to quit on February 23, until Brown required him to select between Respondent and the Union. I have concluded that Brown's conduct was unlawful. I have credited Zache's testimony that he wanted to work for Respondent beyond February 24, and he was uncomfortable about leaving Respondent's employ. I have also credited his testimony that he was not ready to give Brown 2 weeks notice on February 24 and that he would not have done so, had Brown not forced him to choose between Respondent and the Union on that date. Accordingly, I have concluded that the Board's usual reinstatement and backpay remedies should be required for Zache.

<sup>45</sup> The complaint was amended to request that the Board order Respondent to "reimburse all discriminatees entitled to a monetary award in this case for any extra federal, and/or state income taxes that would or may result from the lump sum payment of the award." The Acting General Counsel's proposed order would represent a change in Board law. See *Paliotta General Contractors*, 333 NLRB No. 80 fn. 1 (2001) (not reported in Board volumes), and *Hendrickson Bros., Inc.*, 272 NLRB 438, 440 (1985), enf'd. 762 F.2d 990 (2d Cir. 1985). The parties have not briefed this issue to me, and since this a request for a change in the current law, this question should be reserved for the Board. Accordingly, I decline to grant counsel for the Acting General Counsel's request to include the additional relief requested. See *Paliotta General Contractors*, supra.

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<sup>43</sup> Fenrick had not signed a union card at the time of his discharge. The credited testimony reveals that although he had been meeting with

he told a coworker that he had not made a decision as to whether he would be leaving Respondent and pursuing work with the Union. On February 7, Gray confronted Petruska and stated that he had heard that Petruska had been thinking about going Union. Petruska stated that he was not sure, that he would probably give 2 weeks notice in a couple of weeks. At that point, Gray discharged Petruska, stating that if he was planning on leaving anyway, that Respondent did not see investing any more money in him. Petruska credibly testified that he had not made the decision to leave Respondent prior to his discharge. Petruska testified that he took the union apprenticeship placement test on February 2, that he was waiting for the results to make up his mind as to whether to leave, and that he did not receive the results prior to his discharge. Petruska testified that poor performance on the test would have caused him to stay at Respondent. However, when he received the results he placed as a third-year apprentice, while he was only rated as a second-year apprentice while working for Respondent. Thus, I have concluded that Petruska had a plan in place prior to his discharge, that if he did well on the Union's apprentice exam, that he was going to quit. Petruska did perform well on the exam, and I have concluded from his testimony that his employment with Respondent would have ended within 2 weeks of his receiving the results of the exam, since his testimony revealed that he had intended to give Respondent 2 weeks notice at the time that he decided to quit. I have concluded that Petruska's backpay should extend until 4 weeks from the date of his discharge since that was the estimate that he gave Gray as to how long he expected to remain in Respondent's employ on February 7, unless Petruska can demonstrate that he received the results of his apprenticeship test later than expected. I note that Petruska testified that he actually started working for a union contractor on February 8. However, the fact that he was able to find immediate employment in a tight labor market after he was discharged is not sufficient to cut off his backpay. See, *Bardaville Electric Co.*, supra at 760 fn. 6; and *Daniel Construction Co.*, 276 NLRB 1093 fn. 3 (1985).

Kellogg's and Gray's testimony reveals that Kellogg told Gray that he was quitting on February 21, and that he offered Gray 2 weeks notice, which Gray rejected. I have concluded that Gray unlawfully accelerated Kellogg's resignation by 2 weeks. I have also concluded that 2 weeks is the extent of Gray's backpay period and that he is not entitled to a reinstatement order pertaining to Respondent. See *Vencor Hospital-Los Angeles*, 324 NLRB 234, 254 (1997).

Respondent should make whole Michael Popovich, Matthew Petruska, and Robert Kellogg for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge or the date it accelerated Kellogg's resignation for the time period specified above for each, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>46</sup>

## ORDER

The Respondent, Campbell Electric Co., Inc., Mishawaka, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to ask union officials to leave Respondent's jobsites.

(b) Coercively interrogating employees about their discussions of their wage rates with other employees.

(c) Informing employees that they should look for another job because they discussed their wage rates with other employees.

(d) Informing employees that they should not have received their last pay increase because they discussed their wage rates with other employees.

(e) Creating the impression among employees that union activity at Respondent was futile and may result in their discharge by informing employees that the Company is heading one way and if you are heading the other way the employees and Respondent would part company.

(f) Coercively interrogating employees concerning their union activities.

(g) Creating the impression of surveillance of employees' union activities.

(h) Discharging employees or accelerating employees' resignations because of their support for the Union.

(i) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Fenrick and Brian Zache full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Fenrick, Michael Popovich, Brian Zache, Robert Kellogg, and Matthew Petruska whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or forced or accelerated resignations of Michael Fenrick, Michael Popovich, Brian Zache, Robert Kellogg, and Matthew Petruska, and within 3 days thereafter, notify the employees in writing that this has been done and that their discharges and/or forced or accelerated resignations will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>46</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

(e) Within 14 days after service by the Region, post at its facility in Mishawaka, Indiana, copies of the attached notice marked "Appendix."<sup>47</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 11, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. April 5, 2001

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

<sup>47</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT direct our employees to ask union officials to leave the our jobsites.

WE WILL NOT coercively interrogate our employees about their discussions of their wage rates with other employees.

WE WILL NOT inform our employees that they should look for another job because they discussed their wage rates with other employees.

WE WILL NOT inform our employees that they should not have received their last pay increase because they discussed their wage rates with other employees.

WE WILL NOT create the impression among employees that their union activity is futile and may result in their discharge by informing employees that the Company is heading one way and if you are heading the other way the employees and Campbell Electric Co., Inc. will part company.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of Local Union 153, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT discharge our employees, force them to quit, or accelerate their resignations because of their support for the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's Order, offer Michael Fenrick and Brian Zache full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Fenrick, Michael Popovich, Brian Zache, Robert Kellogg, and Matthew Petruska whole for any loss of earnings and other benefits suffered as a result of their discharges and Robert Kellogg's accelerated resignation.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or forced or accelerated resignations of Michael Fenrick, Michael Popovich, Brian Zache, Robert Kellogg, and Matthew Petruska, and WE WILL, within 3 days thereafter notify the employees in writing that this has been done and that the discharges and/or forced or accelerated resignations will not be used against them in any way.

CAMPBELL ELECTRIC CO., INC